

IP 03-0281-C M/S Johnson v USA  
Judge Larry J. McKinney

Signed on 10/22/04

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

|                               |   |                           |
|-------------------------------|---|---------------------------|
| BERT JOHNSON,                 | ) |                           |
|                               | ) |                           |
| Plaintiff,                    | ) |                           |
| vs.                           | ) | NO. 1:03-cv-00281-LJM-VSS |
|                               | ) |                           |
| THE UNITED STATES OF AMERICA, | ) |                           |
| U.S. DEPT OF TREASURY,        | ) |                           |
| U.S. CUSTOMS SERVICE,         | ) |                           |
| \$42,565.00 U.S. CURRENCY,    | ) |                           |
|                               | ) |                           |
| Defendants.                   | ) |                           |

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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| BERT JOHNSON,              | ) |                      |
| Petitioner,                | ) |                      |
|                            | ) |                      |
| vs.                        | ) | 1:03-cv-0281-LJM-VSS |
|                            | ) |                      |
| UNITED STATES OF AMERICA,  | ) |                      |
| U.S. DEPT. OF TREASURY,    | ) |                      |
| U.S. CUSTOMS SERVICE,      | ) |                      |
| \$42,565.00 U.S. CURRENCY, | ) |                      |
| Respondents.               | ) |                      |

**ORDER ON PETITIONER’S MOTION TO SET ASIDE ADMINISTRATIVE  
FORFEITURE**

Before the Court is Petitioner’s, Bert Johnson (“Johnson”), motion to set aside a March 22, 2002, administrative forfeiture of \$42,565.00 United States currency. Johnson claims that he was not properly notified of the forfeiture in violation of constitutional due process requirements. The parties have fully briefed their arguments and participated in oral argument on August 13, 2003. District courts have “jurisdiction to review whether the notice given in the administrative forfeiture proceeding afforded the claimant constitutional due process.” *Garcia v. Meza*, 235 F.3d 287, 290 (7th Cir. 2000). For the reasons set forth below, the Court **DENIES** Petitioner’s motion.

**I. FACTUAL BACKGROUND**

On September 29, 2001, a law enforcement task force consisting of multiple agencies, state and federal, executed a search warrant at Johnson’s residence, 7022 South Arba Pike Road, Lynn, Indiana.

Johnson was present during the search. Resp.'s Resp. at 1. The officers seized at least ninety-five separate items of personal property that were subsequently held by various law enforcement agencies. Pet.'s Exh. A.

On October 2, 2001, Johnson was charged with three felony counts in the Randolph County Circuit Court.<sup>1</sup> The case was dismissed on June 7, 2002, when Johnson's motion to suppress evidence was granted. Pet.'s Exh. C. Johnson claims that he attempted to challenge the seizure of his property, but had some difficulty in locating the items as they were held in different locations. Pet.'s Rep. at 1-2.<sup>2</sup>

The subject \$42,565.00 in United States currency was seized from Johnson and held by the Indiana State Police until November 5, 2001, when it was delivered to the United States Customs Service ("Customs") for institution of federal administrative forfeiture proceedings. On February 19, 2002, Johnson contacted the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to demand return of the funds. Johnson later learned that the currency had been turned over to Customs and demanded return of the funds by letter on March 22, 2002. Pet.'s Exh. A. On April 30, 2002, Johnson received notification, through counsel, that the funds had been administratively forfeited on March 14, 2002, due to his failure to respond to the notice of forfeiture. Pet.'s Exh. H. On November 27, 2001, Customs had sent a "Notice of Seizure," via certified mail, to Bert Johnson, 7022 South Arba Pike, Lynn, Indiana 47355. The notice was returned as being "Attempted-Not Known" and "Vacant." Pet.'s Exh. F. On February 4, 2002, Customs also

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<sup>1</sup> Specifically, Johnson was charged with Dealing in Marijuana under Indiana Code § 35-48-4-10(a)(2)(C)(b)(2), Auto Theft under Indiana Code § 9-18-8-12(2), and Damaging, Removing, Covering, or Altering Identification Numbers under Indiana Code § 35-43-4-2.5(b)(2). Pet.'s Exh. B.

<sup>2</sup> Johnson eventually obtained an order from the circuit court to compel the Indiana State Police to return his property on September 25, 2002. Pet.'s Exh. H.

mailed a second “Notice of Seizure and Intent to Forfeit” to the same address via regular mail, which was returned with notations indicating that the location was without a mail receptacle. Resp.’s Exh. 4. Customs had also published a “Notice of Seizure and Intent to Forfeit” in *The Indianapolis Star* on February 13, 2002, February 20, 2002, and February 27, 2002. Resp.’s Exh. 1; Pet.’s Exh. F.

## **II. DISCUSSION**

The Civil Asset Forfeiture Reform Act of 2000 created the new § 983 of Title 18, which contains the exclusive remedy for a person challenging an administrative declaration of forfeiture issued by an agency of the United States. The statute provides in pertinent part:

**(e) Motion to set aside forfeiture. --**

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person’s interest in the property, which motions shall be granted if -

(A) the Government knew, or reasonably should have known of the moving party’s interest and failed to take reasonable steps to provide such party with notice; and

(B) the moving party did not know or have reason to know of the seizure with sufficient time to file a timely claim.

18 U.S.C. § 983(e). Simply stated, Johnson must show both that the government did not take reasonable steps to provide notice, and that Johnson did not have reason to know of the seizure with sufficient time to file a timely claim.

### **A. NOTICE**

Under 19 U.S.C. § 1607, “written notice of seizure together with information on the applicable

procedures shall be sent to each party who appears to have an interest in [a] seized article.” The Supreme Court set forth the standard for due process in *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 314 (1950). “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* See also *Garcia*, 235 F.3d at 291 (affirming application of the *Mullane* standard for due process challenges to administrative forfeiture proceedings). Actual notice is not required, “so long as the government ‘acted reasonably in selecting means likely to inform persons affected.’” *Id.* (quoting *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)).

Written notice of forfeiture by certified mail to the claimant’s residence generally satisfies due process even if the claimant does not receive actual notice. See *Krecioch v. United States*, 221 F.3d 976, 981 (7th Cir. 2000). “While due process is not satisfied if the notifying party knew or had reason to know that notice would be ineffective,” typically, the “operative question is whether notice was adequate at the time that the notice was sent. . . .” *Garcia*, 235 F.3d at 290 (internal citations omitted). Here, the first notice, sent to the address from which the property was seized, was arguably adequate at the time it was sent. However, the government learned, when both letters were returned as undeliverable, that they were never received. See Pet.’s Exh. F. The question is whether due process requires the government to do more.

The Seventh Circuit examined a similar situation in *Garcia*, involving an administrative forfeiture proceeding relating to seized currency where written notice of the proceeding was sent to the plaintiffs via Federal Express and returned to the government five days later marked undeliverable. See *Garcia*, 235

F.3d at 289. At the same time, the plaintiffs were actively pursuing the seized currency through other administrative and judicial proceedings. *See id.* The government forfeited the property three months after the notice was returned. *See id.* After examining how other circuits have answered this question, the *Garcia* court declined to “adopt a per se rule which only examines notice at the time it was sent and turns a blind eye to subsequent events.” *Id.* at 291. The *Garcia* court also declined to “impose an affirmative duty upon the government to seek out claimants in each case where its initial notice is returned undelivered or to require actual notice in every case.” *Id.* Instead, district courts must undertake a fact-specific analysis under the due process standard set forth by the Supreme Court in *Mullane*, which requires consideration of all circumstances of the case to determine if the notice provided was reasonably calculated to inform the claimant of the forfeiture proceeding. *See id.*

Johnson argues that *Garcia*, where the Seventh Circuit found that the government’s mailing of a single notice returned as undeliverable was not sufficient to satisfy the minimum due process standards required is “strikingly similar” to this case. Pet.’s Rep. at 3. While there are a number of factual similarities, two relevant distinctions merit discussion.

First, in *Garcia*, the government was involved in extended litigation with the plaintiffs, and yet was unable to provide the plaintiffs with actual notice of the ongoing forfeiture proceeding. *Garcia*, 235 F.3d at 291. While, arguably, it would be easier for Customs to have located Johnson if they were engaged in ongoing litigation, the record does not reflect any such circumstances in this case. Nevertheless, Johnson argues that it would have been reasonable for Customs to check state court records for Johnson’s mailing address, as criminal proceedings were ongoing. *See* Pet.’s Resp. at 3. However, the address that Johnson claims to have provided to the state courts as his residence, 7022 South Arba Pike, Lynn, Indiana, is, in

fact, the very same address to which Customs twice attempted service. *See* Pet.’s Exh. G; Resp.’s Resp. at 3. Moreover, this is the same address from which the property was seized. *See* Pet.’s Exh. A.

Second, in *Garcia*, the government made only one attempt at written notice. The court noted that “[i]n this context [where the original notice was returned undeliverable after five days], we believe that another attempt at written notice would have been reasonable, even necessary, under the circumstances and would not have been too burdensome on the government.” *Garcia*, 235 F.3d at 291. That is exactly what the government did in this case. When the first attempt at written notice by certified mail was returned, Customs sent a second notice via regular postal service approximately two months later. *See* Resp.’s Exh. 4.

Johnson raised one other issue which the court shall address. During oral argument, Johnson asserted that he lives in a recall area where mail is delivered to the post office for general delivery. However, if that were accurate, then the postal service would have held the letters instead of returning them as “Attempted-Not Known,” “Vacant,” or for lack of a mail receptacle. Again, Johnson’s assertion that he cannot receive mail at 7022 South Arba Pike appears to be in direct conflict with his statement that he gave that same address to the state courts for the receipt of notices. *See* Pet.’s Exh. G.

Under these particular circumstances, there appears to have been no other reasonable way for Customs to provide personal notice. The Court finds that Customs’ attempts at personal service were sufficient under the due process standard of *Mullane*.

Because personal service could not be effectuated, the government may satisfy due process with mere publication of a forfeiture notice when the government does not know or reasonably cannot discover the claimant’s whereabouts. *See Mullane*, 339 U.S. at 317-319. “[E]mployment of an indirect and even

a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.” *Id.* at 317. Under 19 U.S.C. § 1607, which is made applicable by 18 U.S.C. § 981(d), notice of seizure and intent to forfeit is “to be published for at least three successive weeks in a manner as the Secretary of the Treasury may direct.” Customs published a “Notice of Seizure and Intent to Forfeit” in *The Indianapolis Star* on February 13, 2002, February 20, 2002, and February 27, 2002. Resp.’s Exh. 1; Pet.’s Exh. F. While “[n]otice by publication is not sufficient with respect to an individual whose name and address are known or easily ascertainable,” *Garcia*, 235 F.3d at 292 (quoting *Robinson v. Hanrahan*, 409 U.S. 38, 40(1972)), Customs was unable, on two separate occasions, to serve Johnson personally.

Johnson’s only argument with regard to notice by publication is, in essence, that Customs “could have” also given notice by publication in *The Richmond Palladium-Item*, a daily newspaper in the closest city to Petitioner’s residence. However, an administrative forfeiture is commenced by publication of notice in a newspaper within the district where the property is located for three successive weeks. *See* 19 U.S.C. § 1607; 21 C.F.R. § 1316.75. *The Indianapolis Star* is a newspaper of general circulation in the Southern District of Indiana. Therefore, Johnson’s argument is rejected and the Court finds Customs’ notice by publication in *The Indianapolis Star* sufficient to satisfy minimum due process requirements.

## **B. KNOWLEDGE OF THE SEIZURE**

Furthermore, Johnson has also failed to show that Johnson did not know or have reason to know of the seizure with sufficient time to file a timely claim, as required by 18 U.S.C. § 983(e). Johnson was present during the seizure and had more than five months to claim his interest. Resp.’s Resp. at 2, 5.



Johnson argues that he was unaware that Customs was in possession of the funds. Pet.'s Rep. at 2-3. The Search Warrant Return confirms that the ATF was the only federal agency involved in execution of the warrant and seizure of Johnson's property, and Johnson claims to have had difficulty locating his property as they were held in many different locations. *See* Pet.'s Exh. A, Pet.'s Rep. at 2. However, the applicable statute pertains to the seizure itself, not knowledge of agencies in possession of the property after seizure.

To succeed here, Johnson had to satisfy both requirements of § 983(e). He has failed to satisfy either. Accordingly, Johnson's motion to set aside this administrative forfeiture must be denied.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court **DENIES** the petitioner's, Bert Johnson, Motion to Set Aside Administrative Forfeiture.

IT IS SO ORDERED this 22<sup>nd</sup> day of October, 2004.

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LARRY J. McKINNEY, CHIEF JUDGE  
United States District Court  
Southern District of Indiana

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